IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
NOVEMBER 15, 2006 Session

TOM WICKS and KIMBERLY WICKS v. THE VANDERBILT UNIVERSITY d/b/a VANDERBILT UNIVERSITY MEDICAL CENTER

Direct Appeal from the Circuit Court for Davidson County
No. 04C-989 Walter Kurtz, Judge

No. M2006-00613-COA-R3-CV - March 21, 2007

This appeal comes from a medical malpractice case. The plaintiff underwent a bone marrow harvest procedure at a university hospital in April of 2003, after which the plaintiff began experiencing pain and numbness in his legs, back, and abdomen. The plaintiff and his wife filed a complaint against the university hospital alleging that the doctor and nurse performing the procedure had done so negligently and without the plaintiff's informed consent, and that the hospital was thus liable through *respondeat superior*. The plaintiff also alleged that the defendant had been directly negligent in its failure to properly supervise the attending doctor and nurse, but this claim was dismissed prior to trial. During discovery, the parties disputed the admissibility and nature of certain expert testimony and documents, and the trial court dealt with this evidence through its granting of specific motions *in limine* filed by the university hospital prior to trial. A jury trial was held, and the jury found for the defendant as to lack of informed consent and medical malpractice. The trial court granted the plaintiff a new trial on the informed consent claim, and it entered a final judgment in favor of the defendant on the medical negligence and negligent supervision claims. A timely appeal was filed to this Court. We reverse and remand for a new trial on both the medical malpractice and negligent supervision claims.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

William D. Leader, Jr., John B. Carlson, Nashville, TN, for Appellants

Steven E. Anderson, Sara F. Reynolds, Nashville, TN, for Appellee

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The plaintiff in this case, Tom Wicks ("Mr. Wicks" or "Appellant") is a 39 year-old resident of Chattanooga, Tennessee. Prior to his injury, Mr. Wicks was self-employed, operating his own landscaping business. Around 2002, Mr. Wicks, who habitually donated blood, decided to become a bone marrow collection candidate through the national registry maintained by the National Marrow Donor Program ("NMDP"). A bone marrow transplant is sometimes the recommended treatment for certain patients with premalignant or malignant diseases such as aplastic anemia, leukemia, Hodgkin's disease, or lymphoma. When conventional therapy has failed these types of patients, a bone marrow transplant allows doctors to harvest bone marrow, which contains hematopoietic stem cells, from healthy donors such as Mr. Wicks and provide it to the patient in order to facilitate higher doses of chemotherapy. The treating physician submits a request for bone marrow to the NMDP, which then locates within its registry a potential donor with a matching "histo compatability" type.

In the NMDP, three separate entities form the framework by which volunteers are able to donate their own bone marrow for patients in need of transplants: transplant centers, donor centers, and collection centers. Transplant centers treat patients with illnesses for which chemotherapy has proven unsuccessful, and who await bone marrow donations for a transplant. A donor center is a regional organization that coordinates with registered donors when they are identified as potential matches for patients in need of a transplant. When a potential donor consents to a procedure and is prepared to proceed with a donation, he or she is sent to a collection center for an examination and consultation. If the process is successful, a donor is scheduled for a collection procedure, or bone marrow harvest, at the collection center. In a bone marrow harvest procedure, the donor is given general anesthesia, and small incisions are made through the skin covering the pelvis. The process is performed on the donor's right and left sides of the donor's posterior. A hollow needle is placed through incisions made in the skin on both sides of the posterior iliac crest, or pelvic bone. A syringe is then attached to the hollow needle and bone marrow is extracted from the bone. The needle is reinserted through the incisions at a slightly different angle many times, so that the marrow may be extracted from different portions of the bone. The procedure may result in over one hundred punctures on each side of the donor's iliac crest.

On March 23, 2003, Mr. Wicks received a medical examination at Vanderbilt, a participating NMDP collection center, where he was found to be "healthy and athletic." On April 16, 2003, Mr. Wicks underwent a bone marrow harvest procedure at Vanderbilt University d/b/a Vanderbilt University Medical Center ("Vanderbilt" or "Appellee"), which was performed by Dr. Adetola Kassim ("Dr. Kassim") and nurse practitioner TaCharra Woodard ("Ms. Woodard"). Dr. Kassim performed on Mr. Wicks' left side, while Ms. Woodard mirrored his actions on the right side. After the procedure, Appellant immediately began to experience pain and numbness on the right side of his back and legs which eventually spread to his buttocks and abdominal region. Appellant's neurologist diagnosed him with causalgia, a nerve disorder, which he opined had been caused by the bone marrow harvest and would likely be a permanent condition. In addition to pain and numbness,

Appellant continues to be affected by urinary and bladder problems, which require him to catheterize himself daily in order to urinate, as well as sexual dysfunction.

On April 2, 2004, Mr. and Mrs. Wicks ("Appellants") filed a complaint against Vanderbilt and Dr. Kassim in Davidson County Circuit Court for injuries Mr. Wicks received while undergoing the bone marrow harvest procedure, as well as for Mrs. Wicks' loss of consortium. On April 20, 2004, Appellants filed an amended complaint. Appellants voluntarily dismissed Dr. Kassim from the case, leaving Vanderbilt as the sole defendant. Vanderbilt filed an answer denying all allegations of liability.

The parties engaged in discovery, which included expert disclosures pursuant to Rule 26 of the Tennessee Rules of Civil Procedure, exchange of interrogatories, and depositions of witnesses. Appellants obtained documents from Vanderbilt which stated internal policies with regard to the bone marrow harvest program ("SCT Program"). One such document entitled "Personnel Training and Proficiency Testing" provided as follows: "SCT Program physicians shall maintain their qualifications by performing at least four marrow collections per year." The document also provided that "[i]f an SCT Program physician has performed less than four marrow collections within one year, he/she should perform at least one marrow collection together with a physician who has performed at least four marrow collections per year." The document further stated that "[d]ocumentation of the number of marrow collections performed per year shall be maintained in Staff Personnel Files. The SCT Program Director shall be informed if a SCT Program physician has performed less than four marrow collections during the preceding year." Another Vanderbilt document provided that "[e]ach SCT Program physician and nurse practitioner shall be required to perform four (4) bone marrow collections per year to maintain competency." The manual for the NMDP, of which Vanderbilt was a participant, stated: "[t]he responsible physician . . . must have performed . . . at least four collections at the applicant center in the previous 12 months. Any person assisting in the marrow aspiration (physician, nurse, technician) must have assisted in at least four prior marrow collections for transplantation."

On September 10, 2004, Vanderbilt provided Appellants with a supplemental answer to the following interrogatory:

> Identify the individual(s) who performed or assisted in the performance of the bone marrow harvest procedure on Tom Wicks on or about April 16, 2003, and for each such individual state: the number and approximate dates of all bone marrow harvest/transplant procedures they have performed/assisted in at Vanderbilt; the number of all bone marrow harvest/transplant procedures they have performed/assisted in during their career; and the number of bone marrow harvest/transplant procedures performed during calendar years 2002, and 2003 (for calendar year 2003 state the number of procedures performed both before and after April 16, 2003).

> ANSWER: The procedure was conducted by Dr. Adetola Kassim with the assistance of nurse practitioner TaCharra Woodard. Dr. Kassim performed or assisted in more than 30 bone marrow harvest procedures before arriving at Vanderbilt. Dr. Kassim performed two bone marrow harvest procedures in 2002 and four in 2003. Vanderbilt cannot readily determine the requested information with respect to Ms. Woodard, and she is no longer an employee of Vanderbilt.

On October 12, 2004, Appellants deposed Dr. Kassim, and he represented that he had performed two harvest procedures in 2002 and four in 2003, but that he could be incorrect "by one[.]" Ms. Woodard was also deposed, but she did not know how many procedures in which she had participated during the year prior to Appellants' procedure in April of 2003. On November 30, 2004, Vanderbilt responded as follows to Appellants' following request for production of documents:

> Any document list, compilation, record or log containing information showing the number of bone marrow harvest procedures performed, date(s) of performance, or other information pertaining to bone marrow harvest procedures performed by Adetola Kassim, M.D., and/or LaCharra Woodard.
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> Response:
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> There are no responsive documents. Information regarding the number of bone marrow harvest procedures performed by Dr. Kassim was obtained from billing records for individual patients.

Therefore, no log reflecting the specific number of procedures performed by Dr. Kassim or Ms. Woodard, or the dates of these procedures, had been provided to Appellants at that time.

On June 2, 2005, Vanderbilt deposed Dr. Lawrence Goodnough ("Dr. Goodnough"), Appellants' expert on bone marrow harvest procedures. Dr. Goodnough stated that the NMDP required physicians who performed bone marrow harvests to have operating room privileges, and that he had seen no documents from Vanderbilt establishing that Dr. Kassim had such privileges. Dr. Goodnough also stated that he had seen no documentation from Vanderbilt that showed the number of procedures Dr. Kassim had performed in the year prior to Mr. Wicks' operation, or that would establish that Ms. Woodard had been properly trained regarding bone marrow harvests.

On July 12, 2005, Vanderbilt filed a motion for summary judgment. In its supporting memorandum, Vanderbilt asserted several defenses including that both Appellants' theory of medical malpractice and the informed consent claim failed as a matter of law. Vanderbilt also moved for summary judgment on Appellants' third theory, based upon an allegation that Vanderbilt had been negligent in its selection and supervision of Dr. Kassim and Ms. Woodard for the bone marrow

harvest procedure, which it characterized as a negligent credentialing claim. Vanderbilt's basis for summary judgment on that claim was that Appellants had "failed to allege or prove that Vanderbilt was negligent in allowing Dr. Kassim and Nurse Woodard to perform the bone marrow harvest" and that Appellants could not "establish that a lack of proof of credentials or qualifications caused Mr. Wicks any injury which would not otherwise have occurred."

Appellants responded by denying their pursuit of any separate credentialing claim, and argued that Dr. Kassim's lack of experience was relevant to both the informed consent and negligence theories, noting Vanderbilt's lack of any log exhibiting the number of bone marrow harvest procedures performed by Dr. Kassim or Ms. Woodard prior to Mr. Wicks' operation. While Appellants referred to a separate negligent supervision claim at least once in their response, their argument against the summary judgment motion focused primarily on the informed consent and medical malpractice claims.[1] In an order and memorandum entered by the court on August 24, 2005, the trial court denied Vanderbilt summary judgment as to the medical negligence claim (regarding performance of the procedure), but partially granted summary judgment as to informed consent.[2] The summary judgment order contained no mention of a negligent supervision claim.

On August 29, 2005, Vanderbilt produced documents, specifically a log entitled "Bone Marrow Harvest Ongoing Data List (1/17/05)" and an itemized statement, that appeared to show the number of harvest procedures performed by Dr. Kassim and assisted in by Ms. Woodard in 2002 and 2003. The documents listed Dr. Kassim as the performing physician for bone marrow harvest procedures on the following dates: February 19, 2002; March 20, 2002; February 19, 2003; April 16, 2003 (Mr. Wicks' procedure); and April 25, 2003. The log listed Ms. Woodard as the assisting nurse for harvest procedures performed on the following dates: February 19, 2003; April 16, 2003 (Mr. Wicks' procedure); April 17, 2003; and May 7, 2003.

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[1] Appellants' response to the summary judgment motion provided:

> The Wicks rely on the testimony of their disclosed expert, Tim Goodnough, M.D., who has testified that Vanderbilt and Dr. Kassim deviated below the applicable standard of care with respect to the informed consent process and the performance of the bone marrow harvest, and that Vanderbilt deviated below the applicable standard of care with respect to its supervision of Dr. Kassim.

However, later in that same response, Appellants characterized their causes of action as follows: "The Appellants do not seek to assert a separate claim against Vanderbilt for negligent credentialing. They seek merely to prove that Dr. Kassim – and therefore Vanderbilt – failed to obtain Mr. Wicks' valid informed consent and performed the marrow harvest negligently."

[2] Appellants' informed consent claim need not be thoroughly discussed, as it is not before this Court on appeal. The trial court broke the informed consent claim into two distinguishable claims: failure to disclose risks of the procedure, and failure to explain alternatives. The trial court found that Appellants' claim regarding risks of the procedure failed as a matter of law because he signed a consent form which enumerated many possible risks of the procedure. The court denied Vanderbilt summary judgment, however, on Mr. Wicks' claim that Dr. Kassim/Vanderbilt had not explained alternatives to the bone marrow harvest procedure, and allowed this aspect of the informed consent claim to proceed to trial before the jury.

On Septmber 7, 2005, Vanderbilt filed a motion entitled "Defendant's Motion *In Limine* to Exclude Evidence Regarding Documentation of Dr. Kassim and/or TaCharra Woodard's Qualifications or Credentials." Vanderbilt also filed a motion *in limine* to limit Dr. Goodnough's testimony to Appellants' remaining informed consent claim and medical malpractice claim.

On September 14, 2005, the Appellants filed a supplemental answer to their expert witness disclosure, in which Dr. Goodnough stated that he had reviewed the most recently produced documents and, based upon their contents, he expected to testify at trial that neither Dr. Kassim nor Ms. Woodard were qualified or competent to perform the harvest procedure on April 16, 2003, that it was a deviation from the standard of care for Dr. Kassim and Ms. Woodard to perform the April 16, 2003 bone marrow harvest, and that the deviations from the standard of care were the proximate cause of Mr. Wicks' injuries. After receiving this supplemental disclosure, Vanderbilt filed a supplement to its previous motions *in limine*. Vanderbilt argued that Dr. Goodnough should be precluded from testifying as to the credentials or qualifications of Dr. Kassim or Ms. Woodard because his opinions were not timely disclosed, and because these "new opinions [were] a transparent attempt to support a negligent credentialing claim" which had not been properly asserted. In Appellants' first motion in response, filed on September 16, 2005, they argued that there was no basis for excluding Dr. Goodnough's testimony because these were not "new opinions" and they were timely disclosed.

The trial court held a hearing on the motions *in limine* on September 16, 2005, but the transcript for this hearing was not included in the appellate record. Based on our review of the record, it appears that at this hearing, the trial court excluded the evidence as irrelevant to the claim of medical malpractice in performance of the procedure, but it allowed Appellants to submit further authority in support of admissibility as to the other claims. After the hearing Appellants filed another motion in which they submitted that "even if Dr. Goodnough's testimony on this point is not relevant to the Wicks' medical negligence claim, it is relevant to at least two of the other claims asserted by the Wicks[,]" specifically, negligent supervision and the lack of informed consent.

Prior to trial on September 19, 2005, the trial court again considered Appellants' arguments against excluding Dr. Goodnough's testimony regarding Dr. Kassim and Ms. Woodard's experience with bone marrow harvests, in light of the log produced by Vanderbilt on August 29, 2005. The trial court denied Appellants' motion, which it treated as a motion to reconsider, and it stated its surprise at Appellants' negligent supervision claim in its bench ruling on the issue:

> The negligent supervision, of course, again, I'm repeating myself, was never mentioned to me at the Motion for Summary Judgment. If the Court had granted Vanderbilt its Summary Judgment on the three issues before the Court, the Court – if there was such a claim – and it's alleged, but, you know, lawyers allege a lot of things in Complaints that they don't press. And I don't recall anything being said of it in the Summary Judgment. When I questioned counsel about the issues before the court, I thought I had

> a clear understanding that what we were talking about is the medical malpractice claim, the lack of informed consent on the failure to explain the risks involved, and the nerve issue that applies here, as well as the failure to explain alternatives.
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> This simply comes too late, and I don't think it adds anything to the plaintiffs' case. As I understand it, in order for this to float in the area of medical malpractice, you would have to prove the breach of the standard of care and causation as well as the negligent supervision. And since the claim is against Vanderbilt under respondeat superior, if the plaintiff proves a breach of the standard of care in [sic] causation, the plaintiff wins the case. So I don't see how the negligent supervision adds anything.
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> Let me also say this as a kind of footnote or corollary here. Let's not forget that I'm – when Dr. Kassim testifies, I have ruled that it's appropriate for the plaintiff to cross-examine him on his experience and to even confront him with the Vanderbilt regulation regarding the minimum number of procedures. That goes, of course, to his qualifications and to his credibility as a witness. So the plaintiff is not going to be prejudiced in making sure that the jury understands that this was a doctor who had just a few number of these operations under his belt. That's the ruling of the judge.

Trial was conducted before the Honorable Walter Kurtz and a jury on September 19–23, 2005. The jury returned a verdict for Vanderbilt on the Wicks' claims for medical malpractice and lack of informed consent regarding available alternatives. The negligent supervision claim was not submitted to the jury. In the order entered by the trial court on September 30, 2005, the trial court stated that the jury had unanimously answered "no" to the following questions:

> 1. Was Dr. Kassim and/or Ms. Woodard negligent by deviating from the recognized standard of acceptable professional practice for his/her profession and specialty in this or a similar community in performing the procedure of April 16, 2003?
>
> . . .
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> 3. Did Dr. Kassim deviate from the recognized standard of acceptable professional practice for his profession and specialty in this or a similar community by failing to obtain the informed consent of Tom Wicks before performing the procedure of April 16, 2003?

The court therefore ordered that the claims against Vanderbilt for medical negligence and lack of informed consent as to available alternatives be dismissed with prejudice.[3] Appellants moved to set aside the verdict, or in the alternative, for a new trial on both claims. The trial court thereafter entered an order on December 15, 2005, in which it granted Appellants a new trial on the informed consent claim pursuant to Rule 59 of the Tennessee Rules of Civil Procedure, but denied a new trial with respect to the medical malpractice claim. Appellants moved the trial court to direct the entry of final judgment on their medical malpractice claim and the negligent supervision claim which had been effectively dismissed by the motions *in limine* prior to trial. After hearing this motion on January 26, 2006, the trial court ordered that final judgment be entered with respect to these claims pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. The Wicks filed a timely notice of appeal to this Court.

II. Issues Presented

On appeal, Tom and Kimberly Wicks present the following issues for our review:

1. Whether the trial court committed reversible error by precluding Appellants from attempting to prove that neither Dr. Kassim nor Ms. Woodard had performed four bone marrow harvests per year prior to April 16, 2003, as evidence of a breach of the standard of care regarding their medical malpractice claim against Vanderbilt.

2. Whether the trial court committed reversible error when it precluded Appellants from introducing evidence in support of a claim against Vanderbilt for negligent supervision.

For the following reasons, we reverse and remand for a new trial on both claims.

III. Analysis

The key issues before us in this case relate to the trial court's evidentiary rulings prior to trial, which precluded Appellants' expert from testifying about Dr. Kassim or Ms. Woodard's alleged lack of experience with bone marrow harvests as it related to the medical malpractice and negligent supervision claims against Vanderbilt, and which also severely limited Appellants from referring to this alleged lack of experience as substantive evidence of a breach of the applicable standard of care on the medical malpractice claim against Vanderbilt under a *respondeat superior* theory. Appellants ask us to grant a new trial on the medical malpractice claim based upon the exclusion of this

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[3] In the order, the trial court described its treatment of the negligent supervision claim as follows:

> "In ruling on defendant's motions *in limine*, the Court excluded all evidence with respect to appellants' claim against defendant for negligent failure to supervise its employees and agents, and further excluded any evidence relating to the competence of defendant's employees with respect to the medical malpractice claim except on the issue of credibility of defendant's employee, Dr. Adetola Kassim."

evidence. The Wicks further seek an opportunity to litigate, for the first time, a claim for negligent supervision based upon their assertions that Vanderbilt is liable under ordinary negligence principles for a breach of its duty to supervise its employees.

The record shows that there was significant dispute and confusion throughout this litigation as to what specific claims Appellants opted to pursue, and what evidence would be admitted as substantive evidence supporting these claims. Therefore, we must address the requirements of both claims at issue, as well as the corresponding evidentiary rulings and their potential implications.

A. Medical Malpractice

It is clear that the medical malpractice claim asserted against Vanderbilt was based upon Appellant's theory that Dr. Kassim and/or Ms. Woodard had been negligent in their performance of the bone marrow harvest procedure, and therefore Appellants sought to hold Vanderbilt liable for this negligence, as their employer, under the theory of *respondeat superior*.

Dr. Goodnough, Appellants' expert witness on bone marrow harvest procedures, was the director of transfusion services and a professor of pathology and medicine at Stanford School of Medicine. Prior to that, from 1992 to 2004, Dr. Goodnough was a professor of medicine and pathology at Washington University in St. Louis, Missouri, where he also served as the NMDP medical director. Appellants supplemented Dr. Goodnough's expert disclosures soon after receiving the documents from Vanderbilt related to the number of bone marrow harvests actually performed by Dr. Kassim and Ms. Woodard in 2002 and 2003. In this supplement, Dr. Goodnough stated that he intended to testify that neither Dr. Kassim nor Ms. Woodard was qualified or competent to perform the bone marrow harvest without supervision, that Dr. Kassim's performance of and Ms. Woodard's assistance in the procedure on Mr. Wicks were deviations from the standard of care, and that these deviations proximately caused Mr. Wicks' injuries. The trial court's granting of Vanderbilt's motions *in limine* prevented Dr. Goodnough from testifying regarding these opinions.

At trial, Dr. Goodnough testified that as NMDP director, he had authority or responsibility over persons donating stem cells through bone marrow harvests or apheresis. Dr. Goodnough was certified in the areas of internal medicine, hematology, oncology, and blood banking, and he testified that he had performed "many hundreds" of bone marrow harvests through the course of 25 years. The parties stipulated that Dr. Goodnough was familiar with the applicable standard of care in Nashville or similar communities with regard to bone marrow harvest procedures.

At several points throughout the trial, the trial court prevented Appellants from questioning witnesses as to Dr. Kassim's and Ms. Woodard's qualifications or competence. During his cross-examination by Vanderbilt's counsel, Dr. Goodnough began to testify that, on the date in question, Dr. Kassim had not been qualified to perform the bone marrow harvest without supervision, according to Vanderbilt's internal standards. After a sidebar discussion regarding the scope of the motion *in limine* related to Dr. Goodnough's opinions on this issue, the jury was told to completely disregard this statement.

During their examination of the NMDP coordinator for Vanderbilt, Linda McVay, as to possible criteria for selecting which doctor would perform the harvest if the NMDP director, Dr. Frangoul,[4] was unavailable, the trial court sustained Vanderbilt's objection and cited the prior rulings *in limine*, stating: "We've already discussed that, and she's not the witness to use for that. You've got one little window to get that in, and that's with the doctor himself." Appellants were similarly disallowed from questioning Dr. Frangoul about the Vanderbilt and NMDP policies or Dr. Kassim's and Ms.Woodard's qualifications.

When Dr. Kassim finally took the stand, Appellants were permitted to question him regarding the Vanderbilt policy requiring four procedures per year, as well as the controversial document reflecting the number of procedures performed by Dr. Kassim and Ms. Woodard prior to the April 16, 2003, bone marrow harvest procedure. Although the trial court admitted the Vanderbilt policy and log into evidence, its jury instruction limited the admissibility of this evidence in accordance with its earlier evidentiary ruling:

> You have heard evidence regarding the prior experience of Dr. Kassim and Ms. Woodard. That evidence is only admissible on the issue of judging the credibility of Dr. Kassim or Ms. Woodard as expert witnesses. It may not be considered on the issue of whether or not Dr. Kassim and/or Ms. Woodard violated the standard of care in performing the procedure of April 16, 2003.

Therefore all evidence pertaining to the qualifications of Dr. Kassim and Ms. Woodard, including their own testimony in depositions and during trial, the Vanderbilt policies setting forth the minimum number of procedures required per year, and the log reflecting the number of procedures performed during this period, was drastically limited by the trial court. The NMDP policy setting forth the minimum number of procedures required of participating doctors and nurses was not admitted into evidence.

In Tennessee, a medical malpractice plaintiff must prove the following elements by a preponderance of the evidence:

> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

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[4] Dr. Frangoul was the most experienced Vanderbilt physician in performing bone marrow harvest procedures. Ms. McVay testified that she and a team of physicians decided which doctors would perform a given harvest procedure, and that Dr. Frangoul, if available, always had the "first choice" in performing a bone marrow harvest.

> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Tenn. Code Ann. § 29-26-115(a) (Supp. 2006). "[I]n medical malpractice cases, negligence and causation are ordinarily required to be proved by expert medical testimony." ***Stokes v. Leung***, 651 S.W.2d 704, 706 (Tenn. Ct. App. 1982); *but see* ***Ayers v. Rutherford Hosp., Inc.***, 689 S.W.2d 155, 160 (Tenn. Ct. App. 1984) ("In medical malpractice cases, only the most obvious forms of negligence may be established without expert testimony."). The qualifications for expert witnesses in these cases are as follows:

> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

Tenn. Code Ann. § 29-26-115(b) (Supp. 2006).

"Whether there is a duty owed by one person to another is a question of law to be decided by the court. However, once a duty is established, the scope of the duty or the standard of care is a question of fact to be decided by the trier of fact." ***Dooley v. Everett*** 805 S.W.2d 380, 384 (Tenn. Ct. App. 1990). "Professionals are judged according to the standard of care required by their profession." ***Id.*** at 384-85. "Unless he represents that he has a greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." ***Id.*** at 385. This Court has held:

> The test in Tennessee is whether or not a physician or surgeon, to be held liable for malpractice, is lacking in the reasonable degree of learning, skill and experience which ordinarily is possessed by others of his profession, and he must exercise reasonable and ordinary care and diligence to exert his best judgment as to treatment to be afforded in any given case.

Redwood v. Raskind, 49 Tenn. App. 69, 75, 350 S.W.2d 414, 416-17, (Tenn. Ct. App. 1961) (citing ***Blankenship v. Baptist Mem'l Hosp.***, 168 S.W.2d 491, 495 (Tenn. Ct. App. 1942); ***Floyd v. Walls***,

168 S.W.2d 602, 607 (Tenn. Ct. App. 1941); ***Burnett v. Layman***, 133 Tenn. 323, 328-30 (Tenn. 1915)). In malpractice cases involving the skill of a physician, the case will be controlled exclusively by expert testimony, except in cases where the matter may be regarded as within the common knowledge of laypersons. *See* ***Phelps v. Vanderbilt Univ.***, 520 S.W.2d 353, 356 (Tenn. Ct. App. 1974) (citing ***Redwood***, 49 Tenn.App. at 76, 350 S.W.2d at 416-17; ***Rural Educ. Ass'n v. Bush***, 42 Tenn.App. 34, 47-48, 298 S.W.2d 761, 768 (Tenn. Ct. App. 1956); PROSSER ON TORTS, § 32, p. 164 (4th Ed.)).

In this case, Appellants alleged that either or both Dr. Kassim and Ms. Woodard were negligent in their performance of the bone marrow harvest procedure on Mr. Wicks. After voluntarily dismissing Dr. Kassim from the lawsuit, Appellants sought recovery from Vanderbilt as the sole defendant through *respondeat superior*. "Under the doctrine of *respondeat superior*, a master faces liability for its servant's negligence if the servant is acting within the scope of his or her employment, even if the master itself is not negligent." ***Armoneit v. Elliott Crane Serv.***, 65 S.W.3d 623, 628 (Tenn. Ct. App. 2001) (citing ***White v. Revco Discount Drug Ctrs., Inc.***, 33 S.W.3d 713, 718 (Tenn. 2000); ***Smith v. Henson***, 214 Tenn. 541, 551, 381 S.W.2d 892, 897 (1964); ***Nat'l Life & Accident Ins. Co. v. Morrison***, 179 Tenn. 29, 38, 162 S.W.2d 501, 504 (1942); Warren A. Seavey, HANDBOOK OF THE LAW OF AGENCY § 83 (1964)). "It is well settled that hospitals are liable for the negligent acts of their agents and employees even though they are selected with due care." ***Edmonds v. Chamberlain Mem'l Hosp.***, 629 S.W.2d 28, 29 (Tenn. Ct. App. 1981).

"The admission or exclusion of evidence is within the trial court's discretion." ***White v. Vanderbilt Univ.***, 21 S.W.3d 215, 222 (Tenn. Ct. App. 1999). "Appellate courts will set aside a discretionary decision only when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." ***Id.*** at 223. An appellate court reviews a trial court's discretionary decision to determine (1) whether the factual basis for the decision is supported by the evidence, (2) whether the trial court identified and applied the applicable legal principles, and (3) whether the trial court's decision is within the range of acceptable alternatives. ***Id.*** A trial court's erroneous exclusion of evidence will not require reversal of the judgment if the evidence would not have affected the outcome of the trial even if it had been admitted. ***Id.***

Rule 401 of the Tennessee Rules of Evidence provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401 (2006). "Factual issues can only be resolved accurately and efficiently if the trier of fact is presented with the pertinent evidence and screened from other evidence." Neil P. Cohen, Sarah Y. Sheppeard & Donald F. Paine, TENNESSEE LAW OF EVIDENCE § 4.01[3] (5th ed. 2005). Relevance has two facets: materiality and probative value. ***Id.*** (citing Robert Banks, Jr. & Melissa Maravich, *Relevance: The Tennessee Balancing Act*, 57 TENN. L. REV. 33 (1989)). "[W]hat is material in a case depends on the issues to be resolved in the case." ***Id.*** "Probative value . . . requires that evidence assists in proving what it is offered to prove." ***Id.***

"Tenn. R. Evid. 402 reflects the policy that all evidence meeting Tenn. R. Evid. 401's test of relevancy is admissible unless otherwise excluded on constitutional or statutory grounds or by virtue of other provisions in the rules themselves." ***Richardson v. Miller***, 44 S.W.3d 1, 21 (Tenn. Ct. App. 2000). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403 (2006). "[E]xcluding relevant evidence under Tenn. R. Evid. 403 is an extraordinary remedy that should be used sparingly, . . . and persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion." ***White***, 21 S.W.3d at 227.

We believe that the evidence pertaining to Dr. Kassim's and Nurse Woodard's qualifications for performing bone marrow harvest procedures was relevant to the standard of care related to Appellants' medical malpractice claim. The trial court's decision to limit the jury's consideration of this evidence to the issue of credibility of Dr. Kassim and Ms. Woodard, or in some instances to exclude it altogether, was erroneous. We further hold that the trial court erred in excluding Dr. Goodnough's opinion testimony regarding Dr. Kassim's and Ms. Woodard's qualifications or competence and the standard of care.

Since Appellants' theory of medical malpractice alleged that either Dr. Kassim or Ms. Woodard performed the bone marrow harvest negligently, they were obligated to provide evidence of the standard of care for these procedures, that this standard of care was breached, and that this breach caused Mr. Wicks' injuries.[5] *See* Tenn. Code Ann. § 29-26-115(a) (Supp. 2006). As this procedure was not one about which a layperson would have knowledge, Appellants were required to provide expert testimony in support of their claim. See ***Phelps***, 520 S.W.2d at 356. Given his education and background, Dr. Goodnough was clearly a competent witness to testify regarding bone marrow harvest procedures, and he satisfied the statutory requirements for medical malpractice expert witnesses set forth at Tenn. Code Ann. § 29-26-115(b) (Supp. 2006). Applying our interpretation of the law in Tennessee, this testimony was material to the issue of the standard of care incumbent upon doctors and nurses who perform bone marrow harvests, as it related to the properly provable issue of "the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities[,]" ***Dooley***, 805 S.W.2d at 385, and it was probative of whether or not Dr. Kassim and Ms. Woodard were "lacking in the reasonable degree of learning, skill and experience which ordinarily is possessed by others of his profession," ***Redwood,*** 49 Tenn. App. at 75, 350 S.W.2d at 416-17. We recognize that "the testimony of a physician as to what he

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[5] Vanderbilt argues that the Wicks' claim for medical malpractice relied exclusively on the doctrine of *res ipsa loquitur*, and that the excluded evidence is not relevant to the issues of whether the instrumentality of the injury was under the defendant's exclusive control and whether the injury would have ordinarily occurred in the absence of negligence. *See* Tenn. Code Ann. § 29-26-115(c) (Supp. 2006); ***Seavers v. Methodist Med. Ctr.***, 9 S.W.3d 86 (Tenn. 1999). We believe that this argument mischaracterizes both Tennessee law and Appellants' claim. Although it is clear that Appellants sought to take advantage of the *res ipsa loquitur* inference of negligence, their reliance on this theory does not preclude the admissibility of evidence otherwise relevant to the applicable standard of care. Tenn. Code Ann. § 29-26-115(a) (Supp. 2006) requires medical malpractice plaintiffs to establish the standard of care, breach, and causation. Therefore, it cannot be said that Appellants relied exclusively on *res ipsa loquitur*. Furthermore, the trial court's jury instructions on the medical malpractice claim referenced the elements for both of these theories.

would do or his opinion of what should have been done does not prove the statutory standard of medical practice." ***Lewis v. Hill***, 770 S.W.2d 751, 754 (Tenn. Ct. App. 1988). Although we do not in any way hold that the testimony of Dr. Goodnough or the internal policies of Vanderbilt and the NMDP established the standard of care for bone marrow harvest procedures, we believe that this evidence was at least relevant to Appellants' medical malpractice theory.

Since we have found that this evidence was relevant to the claim at issue, we must apply Tenn. R. Evid. 403 to determine if this evidence was nonetheless properly excluded. We find that the first five considerations in this balancing, "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time[,]" do not outweigh the probative value of this evidence.

Prejudice to Vanderbilt would not necessarily have resulted from the introduction of this evidence, as Vanderbilt was permitted to present its own experts regarding the standard of care, and would undoubtedly have been able to provide its own characterization of the internal policies to the jury. Any prejudice that may have resulted to Vanderbilt is more fairly attributed to Vanderbilt itself, in light of its belated production of the log in question. Furthermore, if Appellee were truly surprised by Appellants' disclosure so close to trial, the trial court could have granted Vanderbilt a continuance to prepare for the admitted evidence, as the defendant sought alternatively in its motions *in limine*. As to any danger of possible confusion of the issues or misleading the jury, this concern could have been alleviated with appropriate jury instructions regarding the standard of care in medical malpractice cases. Finally, although the introduction of this evidence would undoubtedly lengthen the testimony of Dr. Goodnough and involve further questioning of witnesses, we are not convinced that the "undue delay" and "waste of time" considerations outweigh the significant probative value of the evidence. "[A] trial court should not exclude evidence under Tenn. R. Evid. 403 when the balance between the probative worth of the evidence and the countervailing factors is fairly debatable." ***White***, 21 S.W.3d at 227.

Regarding the Tenn. R. Evid. 403 consideration of "needless presentation of cumulative evidence[,]" we recognize that this factor relates to arguments posited by Vanderbilt in support of the trial court's severe limitation of the log's admissibility. Vanderbilt contends that regardless of when it produced the log showing the number of procedures performed in 2002 and 2003, Appellants already possessed the information necessary to pursue proof of any lack of qualifications or competence on the part of Dr. Kassim or Ms. Woodard, in the form of their respective deposition testimony and Vanderbilt's discovery responses.

We find Vanderbilt's argument unpersuasive on this issue. For instance, the following exchange took place at Dr. Kassim's deposition in October of 2004:

> Q. And this number [of bone marrow harvests] – you say two during 2002 and four during 2003, you could be incorrect on that, couldn't you?

A. That's a possibility, but if I'm incorrect, probably by one, but I know I – it's pretty close.

A similar line of questioning was directed to Ms. Woodard at her deposition as well, and her responses were far from illuminating in this regard:

Q. Do you remember performing that harvest with Dr. Kassim even though you don't remember the patient?
A. I performed a number of procedures with Dr. Kassim, so I don't remember this case.
Q. Did you keep any record of the number of bone marrow harvests that you performed?
A. I did not.
Q. Do you know how many you performed before – between November of '02 [when she began working at Vanderbilt] and April of '03?
A. I don't.
Q. Do you know how many you performed between April of '03 and the time you left Vanderbilt?
A. I would not have an accurate number, no.
Q. Would it be a guess?
A. It would be a guess.

It is clear to us that although both Kassim and Woodard were asked questions during discovery about how may procedures they believed they had performed in 2002 and 2003, their deposition responses were fairly vague and noncommittal. In light of the internal standards Appellants intended to rely upon in proving Dr. Kassim's or Ms. Woodard's lack of competence or qualifications for bone marrow harvests, Appellants could not reasonably have been expected to bolster these allegations based solely upon these witnesses' deposition testimony or Vanderbilt's discovery responses. The log produced by Vanderbilt on August 29, 2005, however, served as material and probative evidence of the specific dates on which the doctor and nurse in question had performed bone marrow harvest procedures.

In ***Richardson v. Miller***, 44 S.W.3d 1 (Tenn. Ct. App. 2000), the Court of Appeals vacated a jury verdict and granted a new trial in a medical malpractice case because the trial court had erroneously excluded or limited evidence relevant to the standard of care. The Court held that the jury was entitled to consider the evidence along with the opinions of the plaintiffs' expert witnesses regarding the standard of care, and determined that the appropriate remedy was to vacate the jury's verdict for the defendants and remand the case for a new trial. ***Id.*** at 23. Similarly, in this case, we believe that the documents setting forth the internal policies of Vanderbilt and the NMDP, as well as the Vanderbilt log exhibiting the number of procedures performed by Dr. Kassim and assisted in by Ms. Kassim should have been fully admitted as evidence in support of Appellants' medical malpractice claim. Furthermore, the jury was entitled to hear Dr. Goodnough's excluded testimony

regarding the Vanderbilt and NMDP policies, Dr. Kassim's and Ms. Woodard's alleged lack of conformity therewith, and the relevant standard of care for bone marrow harvest procedures. We believe that the trial court's exclusion or limitation of this evidence as to the claim for medical malpractice in performance of the bone marrow harvest, more probably than not, affected the outcome of the trial. Therefore, we reverse the judgment of the trial court on the medical malpractice claim and remand the case for a new trial.

B. Negligent Supervision

Regarding the negligent supervision theory of liability— which is a claim asserted against Appellee for an alleged breach of a duty to supervise its doctors and employees — and in particular the trial court's and Appellees' position that Appellants first raised this claim a few days before trial as a "last minute throw-in[][,]" Appellants direct our attention to paragraph 20(a) of their amended complaint, in which they claimed that Vanderbilt "[f]ailed to properly supervise its agents and employees, including its attending physicians, residents, interns and hospital staff in the performance of the procedure and with respect to Tom Wicks' care." Appellants note that in Vanderbilt's motion for summary judgment, the defendant called this a negligent credentialing claim, a theory which Appellants disavowed in their response. The court's summary judgment order did not address this separate claim, but focused only on Appellants' theories of negligence based upon performance of the procedure and lack of informed consent. Appellants allege that they properly pled a negligent supervision claim against Vanderbilt in their amended complaint filed in April of 2004, and they assert that the trial court erred in excluding all evidence related to it and effectively dismissing this aspect of their lawsuit *sua sponte* at the outset of trial on September 19, 2005.

We find that Appellant's complaint was sufficient to impart notice to Vanderbilt that they intended to assert a direct claim for negligent supervision. Tennessee's notice pleading requires a complaint to contain only minimum general facts that would support a potential cause of action under Tennessee substantive law. ***Prince v. Coffee Med. Ctr.***, No. 01A01-9508-CV-00342, 1996 Tenn. App. LEXIS 263, at *8 (Tenn. Ct. App. May 3, 1996) (citing Lawrence A. Pivnick, Tennessee Circuit Court Practice § 7-2, at 244-45 (3rd. ed. 1991)). "The courts of Tennessee have long recognized that hospitals have a legal duty to exercise reasonable care toward their patients." ***Bryant v. McCord***, No. 01A01-9801-CV-00046, 1999 WL 10085, at *10, 1999 Tenn. App. LEXIS 26, at *28 (Tenn. Ct. App. Jan. 12, 1999), *affirmed and remanded on other grounds at* ***Bryant v. HCA Health Services of N. Tenn., Inc.***, 15 S.W.3d 804 (Tenn. 2000). In Tennessee, hospitals have a duty "to use reasonable care to maintain their facilities and equipment in a safe condition, to select and retain only competent physicians, to supervise the care given to patients by hospital personnel, and to adopt and enforce rules and policies designed to ensure that patients receive quality care." ***Bryant***, 1999 WL 10085, at *11, 1999 Tenn. App. LEXIS 26, at *30. Negligent supervision is a theory based upon a defendant's breach of its duty to hire competent employees and to appropriately supervise those employees. *See* ***McLeay v. Huddleston***, No. M2005-02118-COA-R3-CV, 2006 Tenn. App. LEXIS 655, at *27-30 (Tenn. Ct. App. Oct. 6, 2006).

The trial court has the authority to dismiss a complaint *sua sponte* in the absence of a motion to dismiss when the complaint fails to state a claim upon which relief may be granted, although such practice is not to be encouraged. ***Huckeby v. Spangler***, 521 S.W.2d 568, 571 (Tenn.1975). In such a case, the court should construe the complaint liberally in favor of the plaintiff, taking all of the allegations of fact therein as true. ***Id.***; *see also* ***Lackey v. Carson***, 886 S.W.2d 232, 232 (Tenn. Ct. App. 1994) (citing ***Sullivant v. Americana Homes, Inc.***, 605 S.W.2d 246, 249 (Tenn.App.1980)). Any such dismissal by the trial court, like a dismissal under Rule 12 of the Tennessee Rules of Civil Procedure, is subject to scrutiny on appeal. ***Huckeby***, 521 S.W.2d at 571 (citing generally ***Williamson County v. Twin Lawn Dev. Co., Inc.***, 498 S.W.2d 317 (Tenn. 1973)).

The previously discussed evidence excluded or limited by the trial court was integral to Appellants' claim against Vanderbilt for negligent supervision. Therefore, the effect of this exclusion was to dismiss the negligent supervision claim. In ***Rucker v. Meyer***, Shelby Equity No. 18, 1984 Tenn. App. LEXIS 3084 (Tenn. Ct. App. August 20, 1984), this Court was faced with a similar issue. The trial court applied the parol evidence rule to grant the defendants' motion *in limine* and exclude the plaintiff's evidence of a side agreement between the parties. ***Id.*** at *3-4. The plaintiff's counsel conceded that the claims for breach of contract and fraudulent misrepresentation must fail without the evidence. ***Id.*** at *5. On appeal, we focused on the trial court's decision to exclude the evidence, a question of law, stating: "The trial court was not in error in dismissing the complaint, therefore, unless there was error of law in excluding the proffered evidence." ***Id.*** This Court determined that the trial court had correctly excluded the proffered evidence and affirmed. ***Id.*** at *12.

Vanderbilt argues that if the trial court erred in excluding this evidence and ultimately dismissing the negligent supervision claim, this Court should view the error as harmless. In support, Vanderbilt cites the jury's verdict in its favor on the medical malpractice claim. Vanderbilt contends that "[b]ecause the jury found that the procedure was performed properly, the only conclusion to be drawn is that the presence of a supervisor would not have affected the performance of the procedure." We do not find this argument convincing, because we have already stated that the jury's verdict on the medical malpractice claim was, more likely than not, affected by the exclusion of this evidence.

We believe it is clear that the evidence in question was relevant to Appellants' claim against Vanderbilt for negligent supervision, and that the trial court erred in excluding or otherwise limiting it. Dr. Goodnough's intended testimony regarding the Vanderbilt and NMDP policies, the policies themselves, and the log demonstrating the number of bone marrow harvest procedures performed by Dr. Kassim and Ms. Woodard were indeed material to, and probative of, whether Vanderbilt fulfilled it duty to Mr. Wicks to "select and retain only competent physicians, to supervise the care given to patients by hospital personnel, and to adopt and enforce rules and policies designed to ensure that patients receive quality care." ***Bryant***, 1999 WL 10085, at *11, 1999 Tenn. App. LEXIS 26, at *30. The evidence was also relevant to Vanderbilt's knowledge regarding the competence and qualifications of Dr. Kassim and Ms. Woodard, whom Vanderbilt selected to perform the procedure. We do not believe that any of the countervailing considerations of Tenn. R. Evid. 403 should have

prevented or limited the jury's consideration of this evidence or Appellants' corresponding claim against Vanderbilt for negligent supervision. Accordingly, we reverse the trial court's dismissal of the negligent supervision claim and remand for a new trial on this issue.

IV. CONCLUSION

For these reasons, we reverse the judgment of the trial court as to medical malpractice, and remand the case for a new trial on this claim. We also reverse the trial court's dismissal of the negligent supervision claim and remand for a trial on this issue. Costs are assessed against Appellee, Vanderbilt, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE